termination of the English courts in regard to the point, so far as we have been able to find, might have led to the conclusion that, when the officer has at his command all the assistance he could desire or possibly need, he was at least, as a careful and considerate officer, resolved to execute the process effectually, bound to command such assistance as was at his disposal. But the cases have not, perhaps, gone this length; and in favor of officers we certainly should be content to allow all indulgence consistent with good faith, and the decision takes, perhaps, the safer view upon this point, and clearly so upon the main point involved. The case is one of considerable interest to the profession.

I. F. R.

In the Supreme Court of Pennsylvania, Eastern District, Philadelphia, March, 1862.

JOHN C. CLARK *vs.* JOHN L. MARTIN.

H. being the owner of two city lots, one a corner property, and the other adjoining it, granted and conveyed the corner lot to D. and R. in fee; reserving a perpetual ground rent, upon the express condition that the grantees, their heirs and assigns, should not erect any building upon the back part of the lot higher than *ten* feet. H. at the time, and for some years afterwards, occupied the adjoining property as his residence. By five several mesne conveyances all made subject to the condition, the corner property became vested in M. in fee; H. having some years prior to the conveyance to M. granted to the then owner permission to raise his back building to the height of *eleven* feet, expressly stipulating that such permission should not prejudice or impair the condition. H. died seised of the adjoining property, and also of the rent reserved out of the corner lot. His testamentary trustee granted and conveyed the adjoining property to C., no mention being made in the deed of the restriction imposed on the corner property. M. subsequently by sundry mesne conveyances became the owner of the rent reserved, which thus merged; and M. threatened to build in entire disregard of the restriction. C. filed a bill in equity to restrain him, and applied for a special injunction which was refused; and M. went on and erected a three story back building. *Held*, upon appeal from the decree of the court below, refusing the injunction and dismissing the bill:

1. That although the clause imposing the restriction was a strict condition in law, yet equity would only inquire into the substantial elements of the agreement, and would enforce it for any party, for whose benefit it appeared to be intended.
2. That the duty of the defendant not to build in violation of the condition was clear; and that this duty was not reserved as a mere personal obligation to H. the original grantor, his heirs and assigns; nor for the benefit of the ground rent; but that it was for the benefit of the adjoining property then owned by H.,

and created an obligation to the owner of that property, whoever he might be; and equity would interfere to enforce and protect his right.

3. That a general plan of lots need not be shown; such a plan is only one means of proof of the existence of the right and duty; and this may appear as well from a plan of two lots, as of any greater number.
4. That the release of a part of a condition only operates as a release of the whole, where forfeiture of the estate for a breach of the condition is demanded, equity will enforce the condition in its modified form in favor of a party who asks only compliance with the agreement.
5. That the defendant having built in violation of the condition, after bill filed, the complainant was entitled to a decree of abatement without amending his bill.

Appeal by complainant from the decree of the Supreme Court at Nisi Prius, dismissing his bill with costs.

The defendant, at the time the bill was filed, was the owner of a "three-story brick messuage, with the one-story back building or dining-room thereto attached," and lot at the southwest corner of Eighth and Locust streets, in the City of Philadelphia, twenty-two feet six inches front on Eighth street, and one hundred feet deep on Locust street, to a ten feet wide alley. The complainant has been since 1851, the owner of the dwelling-house and lot immediately adjoining to the south, and of the same front and depth. Both lots originally formed parts of a larger lot, which, prior to 1814, was owned by Alexander Henry. July 7, 1814, Henry conveyed the corner lot (now defendant's) to Charles Drosddorf and Lewis Roberts, as tenants in common in fee (reserving thereout to said Henry in fee, a yearly ground-rent of $225), "upon this express condition, nevertheless, that the said C. D. and L. R., their heirs or assigns, shall not build or erect, or permit or suffer to be built or erected, on any part of the hereby granted lot of ground, beyond the distance of sixty-five feet from the said Eighth street, any buildings whatsoever, other than privies, milk or bathing houses, and walls or fences not exceeding the height of ten feet from the level of the ground, nor erect any building whatever between the dwelling-house to be erected fronting on said Eighth street, and the aforesaid distance of sixty-five feet from the said Eighth street, other than such as shall merely be for the accommodation of the said dwelling-house." The ground-rent was redeemable at any time within seven years, by payment of $3,750.

Henry died August, 1847, never having parted with said ground-rent or the dwelling-house and lot adjoining the corner. In 1816, Drosddorf and Roberts conveyed the corner property to James Dundas in fee, subject to the ground-rent, and also to the restriction. In January, 1838, Dundas conveyed to Andrew D. Cash in fee, said house and lot, subject to the ground-rent, and also to the restriction. Prior to April 30, 1839, Henry had, as a matter of courtesy merely, without any consideration, consented that Cash should erect a dining-room on said lot eleven feet in height, but refused to allow the restriction to be interfered with beyond the building of the dining-room eleven instead of ten feet high.

Henry, by deed dated April 30, 1839, indorsed on Cash's deed for the corner property, after reciting that Cash had with his consent, previously built a dining-room on the lot, of eleven feet in height, granted to Cash in fee, in consideration of one dollar, the right to continue and maintain the said dining-room of said height forever. "Provided, however, that nothing herein contained shall be so construed, as in anywise to impair, prejudice, or affect the condition and restriction in the said within indenture particularly recited and set forth, in relation to building on the within described lot."

"Mr. Henry's opinion was, clearly, that it would be a great injury to the other property adjoining to the south, if the restriction on the corner lot was violated." The additional foot in height to Cash's dining-room was not regarded as material, and as an act of courtesy Mr. Henry permitted it.

Cash conveyed the corner property May 1, 1839, to Ashhurst, subject to the ground-rent, and restriction "except so far as modified and changed by" the last recited deed. Ashhurst owned the property at the time of Henry's death.

In August, 1847, Henry died, seised in fee of said ground-rent of $225, and also of the lot, with a dwelling-house thereon erected to the southward of and immediately adjoining the corner property.

By his will he devised said dwelling house and lot adjoining the corner, in trust with a power of sale. He also authorized his

executors to assign and convey his ground-rents in payment of legacies.

Said executors by deed dated August 14, 1848, granted and assigned said ground-rent of $225, to Mrs. Martha H. Chambers in fee, in part payment of a devise to her under the will.

In May, 1849, Ashhurst conveyed the said corner property, by the description of "all that three-story brick messuage, *with the one-story back building or dining-room thereto attached*, and the lot of ground, &c., to John Buddy in fee, subject to the ground-rent, and also to said restriction.

The surviving trustee under Mr. Henry's will, by deed dated April 7, 1857, conveyed said dwelling-house and lot, adjoining said corner lot to the southward, to complainant.

In February, 1858, Buddy, conveyed said corner property, subject to said ground-rent and also to said restriction, to John L. Martin, the defendant, in fee.

Mrs. Chambers died in March, 1860, seised in fee of said ground-rent of $225, having first made her will, the executors named in which, by virtue of certain powers therein given, granted and assigned said ground-rent to John L. Martin, the defendant, in fee, whereby the same merged and became extinguished.

The bill, after setting out the title of the respective properties, alleged that complainant, as the owner, by title from Alexander Henry, of the dwelling-house and lot adjoining the said corner premises on the south, was entitled to the full benefit and privilege of said restriction; that his back-buildings face north, and the maintenance of the restriction was absolutely necessary for proper enjoyment of his property, since, if the restriction be infringed or broken, the health and comfort of the occupiers of said property will be irreparably injured; that, by means of the restriction, the light and air have access from Locust street, across the corner lot, to complainant's premises. That, on the western side of said ten-feet wide alley, the wall of the Musical Fund Hall rises to the height of a three-story dwelling-house; and, unless the restriction is enforced upon the corner lot, it may be built upon the full width to its entire depth to said alley, and without limit as to height, and

thus complainant's property be shut in, leaving only an arrow well for access of light and air, and the health and comfort of the occupants, and the property itself, be greatly injured; that it was the intention of defendant to build on the corner lot, without regard to the restriction, under pretence of a right so to do, and prayed an injunction to restrain defendant, his agents, &c., from infringing said restriction, and for general relief.

The answer admits the allegations of the bill as to the title to said two lots of ground and dwelling-houses now vested in the complainant and defendant respectively.

But alleged that in the deed from Henry to Drosddorf and Roberts for the corner property, there is no remedy or penalty prescribed for breach of said condition, nor any covenant on the part of the grantees to perform it; that said Alexander Henry laid out the large lot mentioned in the bill prior to the conveyance to Drosddorf and Roberts, according to a plan given in the answer; that said Henry did not, by his will or otherwise, give and devise to the trustees, to whom he devised the premises adjoining the corner, any right, title, or interest, in or to the condition in the deed to Drosddorf and Roberts; that the grant and assignment from Henry's executors to Mrs. Chambers conveyed the said ground-rent of $225 to her, "together with the reversions and remainders of the premises, and all the estate, right, title, interest, property, claim, and demand whatsoever, which was of the said Alexander Henry, as well at law as in equity, of, in, and to the same, and of, in, and to the lot of ground whereout the said rent is issuing and payable;" that said surviving trustee did not in any way grant or convey to complainant any right, title, or interest, in or to said condition in the deed to Drosddorf and Roberts; that the executors of Mrs. Chambers, by their deed to the defendant, conveyed to him the said ground-rent, "and the reversions and remainders thereof, and all covenants for payment thereof, and all the estate, right, title, interest, property, claim, and demand whatsoever, which was of the said Martha H. Chambers, at and immediately prior to the time of her decease, of, in, and to the same, and of, in, and to the said lot of ground whereon the same was so as aforesaid charged;" denied

that complainant is entitled to any benefit or privilege of said restriction in the deed to Drosddorf and Roberts; or that the enforcing of said restriction is necessary for the proper enjoyment of complainant's property, or that the health and comfort of its occupants or the value of the property would be injured and damaged, if the restriction be not maintained; and admitted that he intended to build without regard to said restriction, as follows, to wit: "At the rear end of said dwelling, and attached thereto, a piazza, extending in height from the ground to the eave of the roof of said dwelling, enclosed on the south side with a nine-inch brick wall and open to the west, and extending about eight feet westward; and also, at the distance of about fifteen feet westward from said dwelling, a back-building, to be connected with said dwelling by a stairway on the side next to Locust street, and to be in width from said Locust street nineteen feet four inches, and in depth westward forty-four feet, to the ten-feet wide alley, and nearly as high as the eave of said dwelling, leaving on the south, along the entire length of said back-building, a space of three feet two inches between its face and his party line on the south, and a clear space, between said back-building and complainant's back-building, of eleven feet," and alleged that at the time of the deed to Drosddorf and Roberts, that part of the City was almost exclusively ocupied by dwellings; that since then, places of business have been advancing into that neighborhood, and he desired to improve his property in such manner as to conform to advances of business, that he might enjoy its first fruits, and not be deprived of them by the diminution of its value as a mere place of residence.

It appeared, from the proofs taken before an examiner, that complainant had known of the restriction before he purchased the property adjoining the corner from the surviving trustee under Henry's will; that the trustee had no doubt but that the purchaser of that property would be entitled to the benefit of the restriction upon the corner property; but at the same time was unwilling, as the will made no mention of the restriction, and he was acting in a fiduciary character only, to execute a deed containing an express grant of the benefit of the restriction; that, in consequence of this

unwillingness, complainant, at the joint expense of himself and said trustee, obtained the opinion of eminent counsel that the purchaser would be entitled to the benefit of the restriction as appurtenant to the property, of which benefit he could not be deprived by any act on the part of any other representative of Henry; and that upon this opinion complainant took his deed from the surviving trustee, without any express grant of the benefit of the restriction.

A motion for a preliminary injunction upon the bill, affidavits, and counter affidavits, having been denied prior to the filing of the answer, the defendant immediately went on and erected a building in violation of the restriction, after the intended plan set out in his answer. When the case came up for hearing on bill, answer and proofs, the bill was dismissed *pro forma*, without argument, and the complainant took this appeal.

S. C. and *S. H. Perkins*, for appellant.

The restriction must have been imposed for the benefit of the property now held by complainant. There is no other purpose for which it can be supposed it was intended. Complainant knew of its existence, was careful to be assured of his right to it before purchasing; and its advantage must have entered into the consideration he paid. Defendant never paid for its release or extinguishment. The general terms of the release of the ground-rent must be restricted by the recitals: *Rapp* vs. *Rapp*, 6 Barr, 48; *Kirby* vs. *Taylor*, 6 John. Chanc. 251; *Jackson* vs. *Stackhouse*, 6 Cowen, 122; *Cole* vs. *Gibson*, 1 Vesey, Senr. 504. It was the estate in the ground-rent alone which became merged; and even if it be conceded that the restriction is annexed to the estate in the rent it is not merged. Preston on Merger, 454.

The clause imposing the restriction, notwithstanding the words "upon condition," is not necessarily to be treated as a condition It is a covenant, or agreement; or if not a covenant, creates an easement for the benefit of the adjoining property; and the only property which it adjoins is that now owned by complainant. A clause will never be construed as a condition, when its language can be resolved into a covenant. *Paschall* vs. *Passmore*, 15 P. S. R.,

3 Harris, 307. See also *Cromwell's Case*, 2 Co. 71, a; Touchstone, p. 122. Any words which import an agreement will make a covenant, 3 Com. Dig. 263, Covenant A. 2. And see *Hoyt* vs. *Carter*, 19 Barb. S. C. Rep. 212. The complainant, even if unable to bring an action of covenant, is yet entitled to the aid of a Court of Equity to enforce the covenant or agreement made for the benefit of the estate which he now owns. *Blecker* vs. *Bingham*, 3 Paige Ch. Rep. 246; *Barrow* vs. *Richard*, 8 Id. 351; *Bronwer* vs. *Jones*, 23 Barb. S. C. Rep. 153; *Tulk* vs. *Moxhay*, 2 Phillips Ch. Rep. 774; *Biddle* vs. *Ash*, 2 Ashmead, 221; *Mann* vs. *Stephens*, 15 Simons Ch. Rep. 377; *Miller* vs. *Hill*, 3 Paige Ch. Rep. 254; *Whatman* vs. *Gibson*, 9 Simons Ch. Rep. 196; *Cole* vs. *Sims*, 23 Eng. L. & Eq. Rep. 584; *Talmadge* vs. *East River Bank*, 2 Duer Rep. 614; *Hodson* vs. *Coppard*, 7 Jur. N. S. 11.

The interference of equity may be justified on the ground of compelling specific execution of a contract. *Scott* vs. *Burton*, 2 Ashmead, 324; *Barret* vs. *Blagrave*, 5 Vesey, 555; *Stuyvesant* vs. *The Mayor &c. of New York*, 11 Paige Ch. Rep. 414; 1 Smith's Leading Cases, 5 Amer. edit. Hare & Wallace's notes, 145.

The additional one foot in height allowed as a modification of the restriction was not material; and in no way changes of affects the restriction, or the relative position of the properties; *Duke of Bedford* vs. *Trustees of the British Museum*, 2 Myl. & K. 552, so as to render the interference of equity for its enforcement improper.

The defendant is estopped from denying the existence of the restriction just as he found it in force when he purchased the corner property. It is a case of *estoppel in pais*. *Pickard* vs. *Sears*, 6 Ad. & El. 469; *Gregg* vs. *Wells*, 9 Id. 97; *Freeman* vs. *Cooke*, 2 Exch. Rep. 663; *Hamilton* vs. *Hamilton*, 4 Barr, 194; 2 Smith's Leading Cas. 5th Amer. edit., 649, 653; *Waters' Appeal*, 35 P. S. R., 11 Casey, 523; *Dezell* vs. *Odell*, 7 Hill, N. Y. 219; *Wood* vs. *McGuire*, 15 Georgia, 202; *McCravey* vs. *Remson*, 19 Alabama, 430.

Thos. S. Smith and *Wm. L. Hirst*, for defendant. The clause in the deed from Henry to Drosddorf and Roberts is a condition. It follows immediately after the grant without dependence on any other sentence of the deed; the words are the words of the grantor, and not of the grantees; and are compulsory on the grantees *not* to do an act; Co. Lit. 201, a. The condition is repugnant to the grant, and therefore void. Smith on Real and Personal Property, 62; 2 Crabb's Law of Real Property, 795, sec. 2132; Littleton, sec. 360; Co. Lit. 223, a; Bac. Abr. Title, Condition L.; Touchstone, 131–2. There was a reservation of a ground-rent; and a covenant on the part of the grantor for quiet enjoyment so long as the grantees paid the ground-rent.

If not void, the condition was extinguished by the verbal permission given to Cash to build in disregard of it. Smith, Real and Pers. Property, 54; Touchstone, 159; *Goodright* vs. *Davies*, Cowp. 803; *Dickey* vs. *McCullough*, 2 W. & S. 88, c. The grant by deed from Henry to Cash, was either an apportionment of the condition, or a release of the condition upon condition, and in either case the condition was wholly discharged. If an apportionment, 2 Crabb's Real Property, Title, Condition; *Winter's Case*, Dyer, 309; 1 Inst. 215, a; *Knight's Case*, 5 Co. 55, 58; Touchstone, 159; *Dumpor's Case*, 1 Smith's Lead. Cas. 15; 1 Roll. Abr. 471; *Brummell* vs. *McPherson*, 14 Ves. 173; Co. Lit. 297, b., 215, a. If a release of condition upon condition, Co. Lit. 274, b.; Com. Dig. Title, Condition, a, 8; 2 Crabb's Real Property, 805; *Dumpor's Case.*

If neither void nor released, the condition goes with the estate in the rent, and the rent being extinguished upon its purchase by the defendant who owned the lot out of which it was reserved, the condition is also extinct by merger.

It was personal to the grantor. There is nothing in the line of complainant's title giving him the benefit of the restriction. Nor is there anything in the deed creating it, to show that it was intended for the benefit of the adjoining property.

There was no general plan of building and mutual agreement and obligation, as in *Talmadge* vs. *East River Bank*, and *Cole* vs.

Sims. No specific appropriation of the condition for the benefit of complainant's property as in *Hills* vs. *Miller.*

The defendant is a purchaser without notice of any intended benefit to the adjoining property from the condition. *Tulk* vs. *Moxhay; Hills* vs. *Miller; Hilner* vs. *Imbrie*, 6 S. & R. 401; *Frost* vs. *Beekman*, 1 John. Ch. Rep. 298.

The opinion of the court was delivered by

LOWRIE, C. J.—In 1814, Drosddorf and Roberts bought the corner lot from Alexander Henry subject to a perpetual rent, and with the condition written in this deed, that they, their heirs and assigns, should not erect any building on the back part of it higher than ten feet. Henry being then the owner of the lot adjoining on the south. The corner lot afterwards passed successively to five different owners, the last of whom is the defendant Martin, and in all the deeds the same condition is repeated; so that Martin himself in 1858 purchased on these express terms. Of the adjoining lot, Alexander Henry died seised, and in 1851, his testamentary trustee conveyed it to the plaintiff Clark; and the rent reserved on the corner lot by Henry was purchased by Martin in 1860. Our question is, has Clark as owner of the adjoining lot, any such right to the condition or terms imposed upon Martin's title as entitles him to claim in equity that Martin shall be compelled to observe them? We think he has.

In a proceeding in the common law form it would be necessary to inquire into the form in which the right is reserved, in order to decide whether it should be sued for as a condition, or a covenant, or as a simple contract; but in the equity form of proceeding we inquire only into its substantial elements; what duty does it assure, and to whom?

Here the duty of the defendant is so plain that one may read it running; it is clearly inscribed on every link of the chain of his title to the lot. He took his title expressly on the terms already briefly mentioned. He was not to erect on the back part of his lot any building higher than ten feet, afterwards changed to eleven. To whom then does he owe the duty? No one doubts that it is to

the grantor who reserved or imposed the duty, and to his heirs and assigns.

But did the grantor reserve this duty to himself his heirs and assigns as a mere personal duty, and thus retain in himself, or them, the vain right of saying that lot is not mine, but the owner is subject to my pleasure in the mode of building upon it?

Common sense forbids this, and the law would not allow itself to be troubled with such vain engagements. It is not pretended that this restriction was intended for the benefit of the ground-rent reserved by Henry. And such a pretence would be entirely unreasonable for a restriction that diminishes the value of the lot and of the houses that may be erected on it, cannot increase the security of the rent issuing out of it.

We have no other resource, therefore, than to attribute the restriction to the purpose of benefiting the adjoining lot, then owned by Henry.

Common sense cannot doubt its purpose, and thus it becomes plain that the duty created by the condition and restriction is a duty to the owner of the adjoining lot, whoever he might be.

Very plainly, also, it is a duty that admits the right of the owner of the adjoining lot to have the privilege or appurtenance of light and air over the defendant's lot, and that admits this to be so far subject or servient to that, that the buildings on this must, for the benefit of that, be so limited in height, according to the condition in the deeds.

So such stipulations are always regarded when a form of remedy is selected and allowed, which can admit of treating the case according to the very substance of the contract.

The remedy asked for here is just such a one, under the law authorizing the courts in equity form, to prevent or restrain "the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals." And so abundant are the instances in the administration of equity wherein this very duty has been specifically enforced, that a reference to the cases may very well stand instead of a discussion of the question: 2 Ashmead, 221, 335; 2 Harris, 186; 3 Prige, 246,

254; 2 Phillips, 774; 15 Simons, 377; 7 Jurist, (1861, Rolls Court,) 11; 2 Mylor & R. 552; 11 Prige, 414; 8 id. 351; 2 Duer, 614–23; Barbour, 153; 23 Law Reports, 401, (*Whitney* vs. *Union Railway Co.*, 1860, Superior Court of Mass.;) 23 Eng. L. and Eq. R. 584; 9 Simons, 196.

It was objected at the argument that this remedy applies only as a means of compelling an observance of the terms involved in a general plan of lots; and this element actually exists in about half of the cases just cited; yet they are not decided on that consideration. It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots, as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales were made; but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan.

It is objected, also, that the restriction relied on here, is in the form of a condition, and that it was released by the release of part of it. But this, if true, in such a case, would apply only where a forfeiture of the defendant's estate for a breach of the condition is demanded. Equity does not so treat the case where mere obedience is demanded. And here, at the very time when part of the right was released, the right to the remainder was expressly continued or renewed. The right is very clearly defined, and it is no more inconsistent with the grant of the fee simple than any other right of easement is, and the plaintiff is entitled to a decree in his favor. The breach of the contract and the amount of injury done are plainly sufficient for this: 12 Harris, 159.

It appears by the evidence that, since this suit was brought, the defendant, in disregard of the suit, has gone on and erected the building. This was very wrong, and puts the court into a very painful position. Our decree in equity is not so severe as a judgment at law would be in ejectment for a breach of a valid condition in such a case, for it does not forfeit the house and lot: 8 Pick. 284. But the abatement of part of a house is so unusual, and so seldom that persons put themselves into such a position as to make such a decree necessary, that we have great reluctance in so decreeing, and

have hopes that the parties may come to some reasonable terms. However, our duty is very plain, and the defendant, by disregard of his contract, and by recklessness in building, pending the suit, has brought the evil on himself. Under the general relief clause, the plaintiff can have a decree of abatement, without any amendment to his bill by reciting the fact of the erection pending the action.

Let the decree be drawn in favor of the plaintiff, with costs.

The subject of the validity and method of enforcing restrictions on the use of real property which are generally contained in building leases, and often in freehold conveyances, is one of growing importance, though it has not yet been very extensively discussed in this country. That a great advantage not only in comfort but in health is gained in large cities, by the construction of blocks of buildings on an uniform plan, and with sufficient spaces devoted to the supply of light and air, is beginning to impress itself forcibly on the public mind. The exclusion from such localities of particular trades, which though not technically nuisances, are often in effect such, is almost equally to be desired. The old fashioned way in which villages straggled up into towns, each man planting his house or his shop where it best suited his caprice or his convenience, has been found to result in tortuous and cramped streets, with bad ventilation and imperfect drainage, fruitful of endemic disease. To some extent and in some places this is now remedied by municipal regulation, but much must be left to individual efforts, and to that practical foresight which is the attendant on private enterprise. There would certainly be great cause for regret if there were any imperative doctrines of law which precluded the use of such restrictions, as those to which we have referred, or confined them to a mere personal advantage, available only as between the original parties creating them.

At common law, unfortunately, there were such doctrines, which, as a branch of the rule that rights of action are not assignable, would paralyze a large class of restrictions. By the statute of 32 Henry VIII., no doubt, a considerable extension of remedy was given, where the qualification of ownership was expressed in the form of a covenant. But the decisions on this statute present so many technical refinements, as to what are and what are not covenants "running with the land," and are so much occupied with discussions about words rather than things, that the real intentions of the parties are often disappointed. Besides, the statute does not, in general, extend to conveyances in fee simple, which, of itself, excludes every important class of cases. See the authorities discussed in the notes to Spencer's Case, 1 Smith's Lead. Cases, 5 Am. Ed. 115. And the law still remains unchanged (except in one or two states), in respect to conditions, in which form building restrictions are often expressed, which, being in defeasance of the estate, are construed with the greatest strictness, while, at the same time, they are held not to pass to an assign, nor to be divisible or capable of a partial dispensation: Dumpor's Case, 1 Smith's Lead. Cases, 5 Am. Ed. 85, and notes.

When, however, we turn to the reme-

dies afforded by a Court of Equity, we enter upon a very different order of ideas. There, rights of action are, as a general rule, held to be assignable for a valuable consideration, as of course, and without the help of any statute. And the intention of the parties to the instrument or transaction by which these rights were created, so far as it can be fairly gathered from the language used, interpreted by the light of surrounding circumstances, is looked at, without regard to the technical effect of particular words or phrases. Applying these principles to the matter in hand, it is now settled, in England at least, that wherever parties to a sale or lease of real estate agree that the property dealt with shall (in a reasonable way) be burthened or affected in its incidents or mode of use, for the benefit of other property of the grantor or lessor, this amounts to a contract which equity will specifically enforce, whether it has been expressed in the shape of a formal covenant, has been inverted into a condition, or has been left to be discovered from the circumstances attending the transaction itself. Further, the benefit of the restriction will pass on the sale of the dominant tenement as an easement, appurtenance, or incident of ownership, unless it appears to be of a purely personal character. And, in like manner, a purchaser of the servient tenement, with notice of the restriction, will be held bound by the same duties and obligations as those under whom he claims; it being a familiar rule in equity that the engagements binding on the conscience of the owner of property, are equally so on those who succeed him in title with a knowledge of their existence. To the extent of those engagements, he and they are considered in the light of trustees for those who are entitled to their benefit: Rankin *v.* Huskisson, 4 Sim. 13; Whatman *v.* Gibson, 9 Id. 196; Schreebner *v.* Recd, 10 Id. 9; Mann *v.* Stephens, 15 Id. 397, Tulk *v.* Moxhay, 11 Beav. 571; 2 Phill 774; Patching *v.* Dobbins, Kay 1; Cole *v.* Sims, Id. 56; 5 De Gex, M. & G. 1; Hudson *v.* Coppard, 29 Beav. 4; Piggott *v.* Stratton, 1 De Gex, Fish. & Jones 33.

That these conclusions are the natural consequence of established doctrines, cannot be denied; yet it must be conceded, on the other hand, that it is only recently that they have acquired this definite shape. The earlier equity decisions will be found generally to discuss questions of this kind on the basis of Spencer's Case, and the other authorities at law. In Holmes *v.* Buckley, 1 Eq. Cas., Abr. 27 (A. D. 1691), there had been a grant in fee of a watercourse over certain land, with a covenant on the part of the grantor, for his heirs and assigns to cleanse the watercourse from time to time. This covenant was enforced in equity by an assignee of the watercourse against an assignee of the land, on the ground that it was one *running with the land*, which, however, would seem to be an error. The case of the City of London *vs.* Richmond, 2 Vern. 421 (A. D. 1701), was one where a bill to compel the payment of rent reserved on a lease of waterpower, was sustained against an assignee, on the ground, it would seem, that the subject of the lease being an incorporeal hereditament, there was no privity of estate, and, therefore, no remedy at law, but the inevitable Spencer's Case was cited. On the other hand, in Chandos *vs.* Brownlow, 2 Ridw. P. C. 416 (A. D. 1791), the question arose on a covenant for renewal of a lease, and the Lord Chancellor of Ireland laid it down positively that no relief could be given in equity on a covenant which did not bind the land at law. The decision of the House of Lords, however,

was against his opinion on the whole case, whether on this, or on other grounds which were involved, does not appear. In Barret *vs.* Blagrave, 5 Ves. Jr. 555 (A. D. 1800), an injunction was granted against an *under tenant* for a violation of a covenant in the original lease, against carrying on a particular business on the demised premises, though no action at law would lie in such case. The matter, however, was not argued for the defendant. Then in Bedford *vs.* Trustees of the British Museum, 2 M. & K. 552 (A. D. 1822), Lord Eldon, putting aside any question as to the validity of the particular covenant at law, based his decision, which was the refusal of an injunction, on general grounds of equity; and he adopts the same mode of dealing with the subject in Roper *vs.* Williams, 1 T. & R. 18 (A. D. 1822), a very similar case. It cannot be said that these two decisions are direct authorities in favor of the doctrines which we have above stated to be now established; but, by changing the plane of discussion from law to equity, they undoubtedly prepared the way for it. Next followed the well known case of Keppel *vs.* Bailey, 2 M. & K. 517 (A. D. 1834), in which Lord Brougham went over the whole topic of covenants running with the land, in a manner to exhibit very strongly his learning, industry, and ability, and, at the same time (with due respect be it said), his entire misconception of the elemental principles of equity. After a review of the authorities, he held, perhaps correctly, that the covenant in question there did not bind the assignee at law, and, therefore, he shortly decided, did not bind him in equity. Notice to a purchaser of such a covenant, amounted to nothing, he said, for it was only notice of what could not affect him! Even if his conclusion were right, his reasoning would have destroyed half the jurisdiction of Chancery. To enforce against purchasers with notice, trusts and contracts which could not possibly affect them at law, is its especial province. The assignee of a simple contract even, could not sue the debtor in *assumpsit;* but, if the latter paid the assignor, after notice, his chance in a Court of Equity would be a poor one. The truth is, that Lord Brougham confounded the case of a covenant void *ab initio*, with one which, valid in itself, was simply incapable at law of assignment, as respects its benefit or its burthen. This is plain, because the drift of his main argument is that, to encourage the assignability of covenants of this nature, would lead to "bold attempts to create new kinds of liability and new species of estate." To which the answer is, that, of course, there must be some limit put to the validity of agreements affecting land; but that is no reason why a covenant which is perfectly good between A. and B., shall not be enforced as between C. and D., their respective assignees. To say that X., who has taken a conveyance of a lot of ground under a restriction against dangerous or offensive trades, can be held to the letter of his bargain, however long he may live; yet, that if he sell it at once to Y., he may use it for a powder-mill, or knacker's yard, if he likes, is simply absurd.

This decision in Keppel *vs.* Bailey, seems to have been considered as a harmless eccentricity, for the Vice-Chancellor of England, and the Master of the Rolls, were quite disregardful of it in the subsequent cases of Whatman *vs.* Gibson, Schreebner *vs.* Read, Mann *vs.* Stephens, and Tulk *vs.* Moxhay, before cited; and in this last case, on appeal, it was summarily disposed of by Lord Cottenham, who observed, in effect, that

Lord Brougham could not have meant what he said there, but that if he did he could not coincide with him. Tulk *vs.* Moxhay was the case of a conveyance in fee of a lot of ground, with a covenant by the grantee only to use as a private square, which was enforced against a purchaser with notice. The Lord Chancellor said the question was not "whether the covenant ran with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased;" which he answers at once in the negative, saying: "If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." This was followed by Vice-Chancellor Wood in Patching *vs.* Dobbins and Cole *vs.* Sims, *ut supra*, and by the Equity Court of Appeal, on an appeal in this last case. This may be considered to set this branch of the subject at rest.

Another objection to covenants and restrictions of this character, independent of that of their assignability, which has been unsuccessfully urged in most of the cases cited, is, that, they lead to a perpetuity, and are in restraint of trade. But this was admitted even in Keppel *vs.* Barley not to be tenable, was expressly overruled in Tulk *vs.* Moxhay, Cole *vs.* Sims, and Hodson *vs.* Coppard, *ut supra*, which last was the case of a conveyance in fee, with a covenant that certain trades should not be carried on on the premises.

So far, then, the principal English authorities. In this country, the decisions in New York arrive at the same result, though not, perhaps, with the same clearness and precision. In Hill *vs.* Miller, 3 Paige, 254, and Trustees of Watertown *vs.* Cowen, 4 Id. 510, it was held by the Chancellor that a covenant, or even a collateral agreement on the sale of land in fee, not to build on a particular part of the lot conveyed, would be enforced in equity in favor of a sub-assignee against a purchaser with notice, on the ground that an easement or privilege was thereby created which ran with the land, and was capable of division. So in Barrow *vs.* Richards, 8 Paige, 351, a similar covenant against the carrying on offensive trades was decided to be binding even as against a previous purchaser from the same vendor. And in Tallmadge *vs.* East River Bank, 2 Duer, 614, specific performance of a parol agreement between purchasers of adjoining lots, not to build beyond a certain line, having been acted on, was decreed against one who had violated it. That the agreement is expressed in the deed in the strict form of a condition at law, is no reason why specific performance should not be compelled: Aiken *vs.* Albany, Vermont & Canada Railroad, 26 Barb. 289. In Pennsylvania, also, it has been held that an independent parol engagement between a vendor and vendee, that the buildings on a particular lot, of which part was sold, should be restricted to a certain frontage line, would bind the land: Scott *vs.* Burton, 2 Ashm. 312; but in this case relief was refused against a purchaser without notice. Some of these cases, unfortunately, do not sufficiently discriminate between the grounds of decision at law and in equity on this subject, and use expressions borrowed from the rules laid down in Spencer's Case, which are not very accurately applied. See the observations in the American note to Spencer's Case, *ut supra*. An expansion of remedy which may be very wise in the one tribunal is not always so in the other; for it must be remembered, for the protection of assignees of

the land, that the defence of "purchaser without notice" is not available at law.

In a recent case in Massachusetts, which arose on a restriction contained in a conveyance of a building lot, against the use of the premises for any nauseous or offensive trade, the later English doctrine was expressly followed and applied: Whitney *vs.* Union Railway Co., 23 Bost. L. R. 401. The language of the learned judge who delivered the opinion of the court, places the matter in its true light, and sustains such restrictions in equity against purchasers with notice. But a later case of Badger *vs.* Boardman, 24 Bost. L. R. 303, which was also in equity, is not so satisfactory, and shows a tendency to return to the old common law doctrines. There a grantor conveyed part of a larger lot of ground, with a restriction against erecting any building thereon above a certain height. This was held to be a purely personal covenant, and not to pass to an assignee of the remaining land, there being, in the opinion of the court, no language in the deeds under which the parties claimed from which it could be fairly inferred that this restriction was *intended* to enure to the benefit of the estate owned by the plaintiffs, who as assignees were seeking to enforce the covenant.

This last decision, as it is in conflict with that which is the occasion of this note, and at variance with the views therein expressed, perhaps requires a few words of respectful comment. There may have been something in the facts of the case, which would justify the conclusion arrived at; but it would seem to us, with great deference, that the argument, from the silence of the deeds on the subject, ought to have been reversed. It is not reasonable to suppose that a grantor, unless he says so in express terms, means a restriction of this character to operate only for his own personal benefit, and not for that of the land retained by him. Why should he? As it to that extent depreciates in value what he is selling, it is equivalent to so much purchase-money retained; and it would be a foolish bargain, indeed, to sacrifice a distinct, present advantage, for the chance of being bought off for a small sum at a future day, when he has parted with his interest. Nor is it more reasonable to suppose that such a remote contingency enters into the calculation of the vendee, particularly as it is quite probable that, if it should ever happen, it would enure to the benefit of some grantee of his own, not to himself. And it would be equally foolish for him to add to his purchase-money upon so fragile a hope. To import such a meaning into a contract of this nature, would turn it so far into a mere aleatory one, the more to be discouraged, because it would tend to mislead and injure sub-purchasers of the grantor. A Court of Equity, therefore, applying the covenant or condition to the facts of the case, and not merely parsing the words in which it is expressed, as the old common law judges did, must presume that it was stipulated by the grantor, for the benefit of his adjoining property. This being so, it would pass, on a sale of the latter, to the purchaser, without any express words in the conveyance, as a mere equitable incident or appurtenance, as, indeed, all subsidiary rights, easements, or privileges connected with property necessarily do, if nothing is said to the contrary.

Having now sketched the history and development of the doctrine of courts of equity on the general subject of the principal case, there are some observations on its practical operation, and the limits within which it ought to be confined, which it would be desirable to

make, as it is obvious, if not carefully guarded, it might hereafter lead to some inconvenient consequences; but we have not sufficient space for the purpose. There is one suggestion, however, which we may throw out in conclusion, for what it may be worth. The common law rule, as corrected by the statute of 32 Henry VIII., confined the assignability of covenants with a grantor of land, to cases where he had some reversionary title left in himself. There is no doubt that there was much practical wisdom in this, for if burthens on real estate, perhaps capriciously or foolishly created, could be enforced in *perpetuum*, in favor of persons who had no interest to be protected or advantaged thereby, the inconvenience and detriment to the community at large would be very great. But the older lawyers looked on a piece of land only as an isolated fact, subdivisible, in point of ownership, into particular estates, with a reversion or remainder, but having no definite juridical relation with any other piece of land. At the present day, in a more complicated organization of society, it often happens that a man who sells a small lot of land out of a larger one, has as great an interest to protect in that which remains in him, as he could have upon any technical reversion; much greater, indeed, than in that dependant on a lease for a thousand years, to which covenants may unquestionably be attached. He has, in fact, a sort of material reversion. Is it not possible, then, from this point of view, to adapt the old rules of law to their changed circumstances, so as to reconcile, in some degree, the conflicting decisions at law and in equity? Now a man may obtain an injunction, where he could not bring an action, or could at any rate recover only nominal damages. Indeed, for most practical purposes, the ingenious logic and abstruse learning of Spencer's Case, must hereafter be of small importance. Yet it would be a pity to lose sight of the principles which lie behind them, and to swing so far in the opposite direction as to obliterate all distinction between real and personal covenants. Would it not be well to preserve the essence and reason of that distinction, by enlarging, if it could be done, the doctrines of the earlier cases, so as to comprehend, not merely reversions proper, but that very real, though still unrecognised interest, which, as we have said, a grantor retains in the material subdivisions of his land? This, perhaps, could not be done at law, without the aid of a statute, but it might prove to a Chancellor a safer and readier clue to determine the character of a covenant or condition, than any general notions of equity, which must vary much with individual judges. It is always better, where it is possible, to follow the analogy of established principles, where they have ceased to be directly applicable, than to elaborate a new theory, which must require a long time, and involve much conflict of decision, before it can be condensed into a practical system of rules. H. W.